Nos. 11485-11486.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Herbert G. Rell, Bankrupt,

Appellee.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Lovina Rell, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

HENRY MERTON,
1204 Loew's State Building, Los Angeles 14,
Attorney for Appellant.

Parker & Company, Law Printers, Los Angeles. Phone TR. 5206.

TABLE OF AUTHORITIES CITED

Cases

Statutes

Nos. 11485-11486.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Herbert G. Rell, Bankrupt,

Appellee.

CITIZENS NATIONAL TRUST & SAVINGS BANK OF LOS ANGELES, a National Banking Association,

Appellant,

vs.

GEORGE GARDNER, as Trustee of the Estate of Lovina Rell, Bankrupt,

Appellee.

APPELLANT'S REPLY BRIEF.

I.

Under the title of "Statement of the Case," appellee charges appellant with making an incorrect statement of fact where it states in its opening brief that as a party to the escrow, appellant was a lender of funds "to enable the bankrupts to pay the *full* purchase price demanded by

the vendor." For appellee to charge this statement as incorrect he must give it a meaning different from what is intended by appellant. It is true that appellant's loan was to enable the bankrupts to pay the full purchase price demanded by the vendor Wilson for his garage business. It was made for no other purpose than that. Appellant does not say and it is not contended that the amount of the loan equals the total purchase price or consideration demanded by the vendor.

II.

Paragraph I of appellee's Argument cites authorities on the point that the law relative to chattel mortgages must be strictly construed. Nothing in said paragraph shows noncompliance of the law by appellant or answers appellant's points and authorities.

III.

In Paragraph II of appellee's Argument, under the title "The Chattel Is Not a Purchase Money Mortgage," he proceeds to define a purchase money mortgage, asserting in effect, among other things, that unless the mortgage is for the full purchase price it is not a purchase money mortgage. His main purpose, however, is to attempt to nullify the applicability of the case of *Rosum Utilities,* 105 F. (2d) 132, to the chattel mortgage involved here. To proceed to define what or what may not be labeled a purchase money mortgage is to sidetrack the basic, logic and reason for the decision in that case. It is submitted that it matters not whether the chattel mortgage paid all or part of the total purchase price, or whether the chattel mortgage is to the vendor or to a third party who entered into the transaction jointly with the buyer and the seller in effecting the transaction. The substance and effect is

the same; namely, that the buyer is *acquiring* assets rather than disposing of his assets; that he acquires no greater estate in the mortgaged property than one subject to the chattel mortgage; that it is impossible for the buyer's creditors to be defrauded by reason of the chattel mortgage, or in any way affected.

Giving support to appellee's contention that the law must be strictly construed, it is submitted that Section 3440 of the Civil Code is not applicable to the chattel mortgage here involved because the buyer was not a "garage owner" until *after* the chattel mortgage was given. The code section applies only to the equipment of a "garage owner." *We are not here concerned with the creditors of Andrew H. Wilson, the vendor.* Wilson was the "garage owner" right up till the time of the close of the escrow and delivery of the chattel mortgage to the appellant.

Appellee cites the case of *Rolando v. Everett,* 72 Cal. App. (2d) 629. This case deals only with the question of strict conformance to the law in respect to certificates of acknowledgment on chattel mortgages.

IV.

It is submitted that Paragraph III of appellee's argument fails to answer points raised by appellant in support of its contention that Section 3440 of the Civil Code is not applicable to the chattel mortgage involved. Appellee merely emphasizes the fact that no notice of intention to chattel mortgage was published in a newspaper of general circulation in connection with said mortgage and assumes "that the appellant intended to publish such a notice but for some unexplained reason had failed."

V.

In Paragraph IV of appellee's argument, he insists again on taking the *date* appearing on the chattel mortgage, to wit, May 4, 1945, to the date of its recording in the Office of the County Recorder, to wit, May 24, 1945, as the measure of time in charging undue delay in its recordation. Appellant, in its opening brief, has submitted that the date appearing on the chattel mortgage cannot with logic and reason be the date from which to measure the time of recordation or determine the question of undue delay in recordation. For the appellee to insist that such date prevails and not the date of delivery at close of escrow is grossly unsound.

Needless to say the document never became a mortgage until the escrow closed and the mortgagee had no right to it or any dominion over it until such time. The case of *Williams v. Belling*, 76 Cal. App. 610, cited by appellee, points out that any presumption that an instrument was executed and delivered on the day it bears date is disputable, and may be overcome, and the stipulated facts in this case clearly show that the mortgage was not delivered to the appellant until close of escrow on May 19, 1945.

VI.

Paragraph V of appellee's argument asserts the right of the trustee to contest the validity of the chattel mortgage. The trustee's right to contest the validity of the chattel mortgage is not questioned. The appellee cites an authority to the effect that a void chattel mortgage is void as to all creditors. He fails, however, to give any reason to hold that the chattel mortgage involved here is entirely void.

VII.

Paragraph VI of appellee's brief deals with the subject of the deposit of the chattel mortgage with the Department of Motor Vehicles. It is submitted that appellee uses dates which are *not the real dates* from which to determine the question of any undue delay in depositing a certified copy of the chattel mortgage with the Department of Motor Vehicles. To point this out specifically, reference is made to page 9 of appellee's brief wherein he gives his summarization, arriving at conclusions in respect to periods of time, which, it is respectfully submitted, are misleading.

In Paragraph 1 of said summarization appellee states as a conclusion that there was "2 months, 16 days delay." Appellee arrives at this conclusion by once more taking the date the mortgage bears; namely, May 4, 1945, rather than the date of its delivery and its effectiveness as a mortgage, which was at close of escrow on May 19, 1945. Appellant also takes the date of July 20, 1945, on which he says appellant appears registered as legal owner with the Motor Vehicle Department. The law in effect at the time the chattel mortgage was given in respect to registration of the motor vehicles was the Vehicle Code of the State of California. Section 195 of said code, which became effective January 1, 1936, was applicable. This section provides that no chattel mortgage or any vehicle registered under the act is valid as against creditors until the mortgagee has *deposited* with the Department a copy of said mortgage. Section 196 of said Vehicle Code provides that *"when the chattel mortgagee has deposited with the Department a copy of the chattel mortgage as provided in Section 195, such deposit constitutes constructive notice of said mortgage and its contents to creditors."*

Thus, we respectfully point out that the registration, or the date of registration, of the chattel mortgage is not the governing date in respect to notice to creditors, but it is the date of the *deposit* of the chattel mortgage which governs.

In Paragraph 2 of appellee's said summarization, appellee takes the date of May 21, 1945, as being the date when the certificate of ownership for the Ford Truck came into the possession of appellant. Appellee acknowledges in the first part of his Paragraph VI of his argument that this date does not appear in the stipulated facts. It is submitted that appellee cannot go beyond the stipulated facts, or contrary to them. The stipulated facts show that the ownership certificates and registration cards on the automobiles were delivered to appellant on the 3rd or 4th of June, 1945. [Tr. p. 19.] Appellee again uses the date on which appellant appears registered as legal owner of the Ford truck; namely, July 20, 1945, and ignores the date of the *deposit* of a certified copy of the chattel mortgage with the Department of Motor Vehicles, to wit, on June 8, 1945. It is from this that appellee makes his statement, which is submitted as incorrect and misleading, viz., "1 month, 29 days delay."

In Paragraph 3 he uses the date of the deposit of the certified copy of the chattel mortgage with the Department of Motor Vehicles; namely, June 8, 1945, and then proceeds to take the date showing the registration of the appellant as the legal owner; namely, July 20, 1945. It is submitted that this is also not the yardstick to measure delay under the Vehicle Code.

In Paragraph 4 of said summarization appellee resorts to a very misleading statement to arrive at his conclusion

of "21 days delay." Here he says that "June 29, 1945, was the date of last notice to appellant that the registration of chattel mortgage was defective." *This does not appear in the Stipulation of Facts and the statement is so framed as to be misleading.* The Stipulation of Facts [Tr. p. 19] states that on June 29 respondent received a letter from the Department of Motor Vehicles stating in effect that there was a technical defect, the exact nature of which the witness could not remember, but it was either insufficient fee transmitted with said documents, or incorrect endorsement of a name.

The Stipulation of Facts does *not* say that the letter referred to gave notice "that the registration of the chattel mortgage was defective" or that it was a "last notice." The defect may have been in Andrew H. Wilson's endorsement for transfer of ownership of the Ford Pick-up truck to the bankrupts, a matter occurring *before* delivery of this ownership certificate to appellant bank. The point to be made, however, is that neither of the parties to this controversy can indulge in speculations, but are confined entirely and exclusively to the Stipulation of Facts. Thus, it can be said with certainty that the Stipulation of Facts does not point to any specific defect, the avoidance of which was under the control of appellant or was due to any act or omission of appellant.

VIII.

We come now to another statement made by appellee following his summarization in Paragraph VI of his argument which is both misleading and incorrect. Appellee makes the statement that "Nor shall a chattel mortgage be valid until the mortgagee is *registered* as the legal owner." (Appellee's Reply Brief p. 10.) To support this appellee

cites the Vehicle Code, Sec. 195. This does *not* support appellee's statement. On the contrary it states in effect that no chattel mortgage on any vehicle is valid as against creditors or subsequent purchasers or encumbrancers until the mortgagee or his successor or assignee has *deposited* in the office at Sacramento a copy of said mortgage with an attached certificate of a notary public stating that the same is a true and correct copy of the original, accompanied by a properly endorsed certificate of ownership to the vehicle described in said mortgage.

Appellee cites *Eckhardt v. Morley,* 220 Cal. 229. This case is inapplicable because the decision is based on the law in effect in 1932. The law then in effect and which the decision refers to is the California Vehicle Act, Sections 45½, 49 and 77 thereof. Section 45½ of said act did then provide that no chattel mortgage on a motor vehicle shall be valid until the mortgagee is registered as a legal owner. This act and the provisions thereof referred to were repealed by the Vehicle Code. (Vehicle Code, Secs. 802 and 803.) The case of *Chilhar v. Acme Garage,* 18 Cal. App. (2d) (Supp.) 775, also cited by appellee, is inapplicable because the decision is premised on the now repealed California Vehicle Act. However, this case involved a situation where no copy of the chattel mortgage was ever deposited with the Department of Motor Vehicles and the mortgage, therefore, was defective under the old act and would be under the prevailing one.

It is suggested that the legislature in substituting the words "deposit" in place of "registration" in respect to point of time as to the effectiveness of a chattel mortgage on creditors or subsequent purchasers or encumbrancers of the mortgagor may have had in mind that ac-

tual registration and the time thereof depends upon performance of the clerical work of the staff of the Motor Vehicle Department, and is beyond the control of the mortgagor and mortgagee. It is to be noted also that in Section 186 of the Vehicle Code ownership of motor vehicles is transferred, as to point of time, not when the registration is effected, but upon the *deposit* with the Department of the endorsed ownership certificate and registration card. Said section specifically provides that no transfer of title or interest in a motor vehicle registered in that department can pass and be effective until the *deposit* of the ownership certificate and registration card. It may be observed at this point that none of the bankrupts' creditors could have any interest in the motor vehicles *prior* to the bankrupts themselves acquiring ownership in the manner prescribed in the Motor Vehicle Code.

Respectfully submitted,

HENRY MERTON,

Attorney for Appellant.